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to want of parties was clearly not taken at the earliest possible opportunity. The defendant belongs to the same caste and resides in the same place as the plaintiffs, and must be deemed to have known of the existence of the sons of Rakhab Das. Had he taken objection in his written statement, the case would have been different; but then, had he done so, the plaintiff could at once, within the period of limitation, have added the names of the minors. The defendant waited until a suit with the minors as defendants was barred by limitation and then took objection. In the case *Pateshri Partap Narain Singh* v. *Rudra Narain Singh* the learned Judges cited with approval a passage from a judgment of the Bombay High Court in the case *Guruvayya Gouda* v. *Dattatraya Anant* (1), where it is said:—"We must hold that the bar of limitation was not established, as the defendant's objection to non-joinder of parties having been taken at a late stage of the suit may be disregarded." We think that the Court of first instance ought not to have entertained the objection having regard to the provisions of section 34 of the Code of Civil Procedure. On the grounds stated above we uphold the decision of the Court below and dismiss the appeal with costs.

Appeal dismissed.

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July 8.

APPELLATE CRIMINAL.

Before Mr. Justice Richards and Mr. Justice Karamat Husain

EMPEROR v. KHEORAJ AND OTHERS. *

Act No. I of 1872 *(Indian Evidence Act), section* 30*—Confession—Joint trial—Plea of the guilty by one of the accused—Use of confession against the rest—Criminal Procedure Code, sections* 271, 342.

Where an accused person has pleaded guilty and the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence with other co-accused and any statement in the nature of a confession that he may make used against them. *Queen Empress* v. *Paltua* (2) followed.

THE facts of this case are as follows:—

Sixteen persons were put on their trial on a charge of dacoity. Of these one Chidda, who had previously made a confession,

* Criminal Appeal No. 522 of 1908 against an order of Rai Baijnath, Additional Sessions Judge of Moradabad, dated the 21st May 1908.

(1) (1903) I. L. R., 28 Bom., 11. (2) (1900) I. L. R., 23 All., 53.

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pleaded guilty, and confirmed the statement which he had already made. The Sessions Judge, however, did not at once convict Chidda, but left him in the dock; continued the trial as against all the accused, and "considered" Chidda's confession as against the others, under section 30 of the Evidence Act. At the close of the trial the Sessions Judge convicted fourteen out of the sixteen accused. As to Chidda he recorded in his judgment:—"the Court convicts Chidda on his own plea of guilty." Of the fourteen persons convicted, three appealed to the High Court, where the question was raised whether Chidda's confession in the Court of Session could under the circumstances be taken into consideration as against the other accused.

The appellants were not represented.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

RICHARDS and KARAMAT HUSAIN, JJ.—The three appellants Kheoraj, Ilahi Bakhsh and Thannu, or Thanwa, have all been convicted under section 399, Indian Penal Code and sentenced to transportation for life. On the 29th January last a large band of dacoits attacked the house of one Dinanath Bania of mauza Badhaiti Fazalpur. The dacoity was a most lawless and audacious one. The dacoits were armed with lathies, pistols, revolvers, daggers and knives. However, the villagers were prepared for the dacoits and attacked them with considerable courage. One of the dacoits was killed by his own friends by mistake. The villagers managed to secure the corpse, which no doubt largely assisted in bringing the criminals to justice. One of the villagers was badly wounded and afterwards died. Sixteen persons were put no their trial on a charge of having taken part in the dacoity. Fourteen were convicted and all sentenced to transportation for life. Two only of the persons charged were acquitted. Of the persons who were convicted Kheoraj, Ilahi Bakhsh and Thanwa alone have appealed. The only question before us is whether or not it has been sufficiently proved that each of the appellants took part in the dacoity. A man named Girdari Singh turned approver. He was pardoned and examined

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as a witness. Chidda, one of the persons who was convicted, was evidently anxious to become an approver. He made a complete confession of his own guilt, which, strange to say, he adhered to even in the Sessions Court. In the Sessions Court he pleaded guilty. It was pointed out to him that the confession would not save him from punishment. He nevertheless said that he was in the dacoity. Towards the end of the judgment the learned Judge says that "the Court convicts Chidda on his own plea of guilty." We think it necessary at this stage to point out to the learned Judge an error in his conduct of the trial of the case. Notwithstanding Chidda's plea of guilty, he kept him in the dock with the rest of the accused. He "considered" the confession of Chidda in considering the question of the guilt or innocence of the other accused. Furthermore at the conclusion of the evidence for the prosecution he put the following question to Chidda "who were with you in the dacoity?" Section 271, clause 2, of the Code of Criminal Procedure, provides that if the accused pleads guilty the plea shall be recorded and he may be convicted thereon. It often happens that when an accused person is called upon to plead he makes a statement which may or may not amount to a plea of guilty, and it is frequently very proper that the Court should enter a plea of not guilty and proceed with the evidence. However, if there are a number of other persons being tried at the same time for the same offence the Court certainly ought not to postpone the conviction of the accused merely for the purpose of allowing the statements he may have made to be considered against the co-accused. We think that if the Court was prepared to have convicted Chidda on his plea of guilty (supposing he had been tried by himself) it ought to have at once convicted him. Section 30 of the Evidence Act provides that a confession made by one person can be considered against other persons who are being tried jointly for the same offence. In our judgment where an accused person has pleaded guilty and the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence. See the case of the *Queen Empress* v. *Faltua* (1). Section 342

(1) (1900) I. L. R., 23 All., 53.

of the Code of Criminal Procedure gives power to the Court at any stage of the trial to put questions to the accused for the purpose of enabling such accused to explain any circumstance appearing in the evidence against him. The section further directs at the close of the case for the prosecution to question the accused generally on the case. But the general examination is only to be for the purpose of enabling the accused to explain the circumstances appearing against him in the evidence. The question put to Chidda, namely, "who were with you in the dacoity?" was a highly improper question, if Chedda had never pleaded guilty. We now proceed to deal with the case of each of the appellants, discarding the confession and other statements of Chidda. Thanwa is mentioned by Girdhari the approver. Only one other witness identifies him, *viz.*, Suraj Mal. Suraj Mal made a mistake and identified a man as having taken part in the dacoity who could not have been there. This mistake was a mistake made by several of the other witnesses, and is perhaps explained by the fact that the man whom he purported to identify bore a striking resemblance to one of the dacoits. Thanwa from the commencement has stated that he was ill at the time the dacoity was committed. He examines several witnesses to support his allegation. He does not say that Girdhari himself bore him any enmity, but he says that a friend of Girdhari's, namely, Roshan Singh, instigated Girdhari to name him. We think there is some doubt as to the guilt of Thanwa. Kheoraj is identified by the approver Girdhari. The learned Judge says that he was identified by Dinanath and Jiwa Ram in jail and in the lower Court by Dallu. No one identifies him except Girdhari in the Sessions Court. His case is that Girdhari bore him an ill-will. He says also that he had taken two accused persons from Gariwan to the police station at Rajpura on the day the offence was committed. One witness whom he calls proves that he did bring the prisoners to Rajpura on the 29th of January and that he left the same immediately as he had "urgent business." It appears that the scene of dacoity is ten kos from Rajpura. He also examined a witness named Mizam. We think that the evidence in the Sessions Court is insufficient, or at least that a reasonable doubt exists in the case of Kheoraj also. Ilahi Bakhsh is identified by a number

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of witnesses in addition to the informer Girdhari. Dinanath, Dallu, Chhutan, Fajji and Jiwaram son of Kewal, all identified him. We think that the case was fully proved against Ilahi Bakhsh. We allow the appeals of Thanwa and Kheoraj and setting aside the convictions and sentences in their case, we acquit them of the charge on which they were tried and direct that they be released. We dismiss the appeal of Ilahi Bakhsh and we direct that a copy of our judgment be sent to the learned Additional Judge of Moradabad.

1908
July 13.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

BUDH SINGH (PLAINTIFF) v. GOPAL RAI AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—Custom or contract.

The wajib-ul-arz of a village in the Saharanpur district of the year 1867 contained the following agreement on the part of the "khewatdars" of the village that "up to the term of the settlement and in future to the termination of the next settlement they will abide by the following terms and act upon them." Amongst the subsequent provisions were certain relating to the right of pre-emption. In a later wajib-ul-arz of 1890 no mention was made of any custom of pre-emption, but it contained these words:—"For the remaining village customs see the wajib-ul-arz prepared in 1867."

Held that the wajib-ul- arz of 1867 recorded a contract and not a custom, and that the rights conferred by it would not be perpetuated by the incorporation in the later wajib-ul-arz of the customs existing in the village.

THIS was a suit to pre-empt a sale of property situate in a mahal of the village of Gumti in the Sultanpur pargana of the district of Saharanpur. The plaintiff relied upon a wajib-ul-arz of the year 1867, the provisions of which he alleged to have been adopted in a subsequent wajib-ul-arz of 1890. In the earlier wajib-ul-arz the names of the zamindars of the village, who were styled "khewatdars" were recited and it was recorded that they agreed that up to the term of the settlement and in future to the termination of the next settlement they would abide by and act upon certain terms. Amongst these was the following provision as to pre-emption:—"If any co-sharer wishes to transfer his share he can do so, first, to his own brother; and in case of refusal by him, all his co-sharers descended from a common ancestor have a

* First Appeal No. 296 of 1906 from a decree of Girdhari Lal, Subordinate Judge of Saharanpur, dated the 18th of June 1906.